

65922.7

65922.7

No. 65922-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BLAINE OLDS,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE	2
D. ARGUMENT	8
1. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE POLICE LACKED PROBABLE CAUSE TO ARREST MR. OLDS.....	8
a. Police may not arrest a person based on an informant’s tip unless the tip satisfies the <i>Aguilar- Spinelli</i> standard.....	8
b. The informant’s tip in this case does not satisfy <i>Aguilar-Spinelli</i> , because the informant never saw Mr. Olds with guns and was motivated by both money and hopes of leniency on her own charges.....	11
c. The remedy is reversal and suppression of the evidence.....	14
2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE THAT ONE GUN WAS A “COP KILLER” AND THAT THE INFORMANT WAS CONCERNED DUE TO THE LAKEWOOD SHOOTINGS..	14
a. Irrelevant evidence is inadmissible, and evidence that is substantially more prejudicial than probative should be excluded.....	15
b. The evidence about “cop killing” guns and the Lakewood shootings should have been excluded because it was irrelevant to the charges and was substantially more prejudicial than probative.....	15
c. The remedy is reversal and remand for a new trial.....	18
E. CONCLUSION	20

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Seattle v. Mesiani</u> , 110 Wn.2d 454, 755 P.2d 775 (1988)	11
<u>State v. Goebel</u> , 36 Wn.2d 367, 218 P.2d 300 (1950).....	15
<u>State v. Graham</u> , 130 Wn.2d 711, 927 P.2d 227 (1996)	8, 14
<u>State v. Jackson</u> , 102 Wn.2d 432, 688 P.2d 36 (1984) .	9, 10, 12, 13
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	11
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	15
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	14
<u>State v. Sieler</u> , 95 Wn.2d 43, 621 P.2d 1272 (1980)	10
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986)	15
<u>State v. Thorn</u> , 129 Wn.2d 347, 917 P.2d 108 (1996)	11
<u>State v. White</u> , 97 Wn.2d 92, 640 P.2d 1061 (1982)	14

Washington Court of Appeals Decisions

<u>State v. Adame</u> , 39 Wn. App. 574, 694 P.2d 676 (1985).....	10
<u>State v. Bauer</u> , 98 Wn. App. 870, 991 P.2d 668 (2000)	9
<u>State v. Conner</u> , 58 Wn. App. 90, 791 P.2d 261 (1990)	9
<u>State v. Freeburg</u> , 105 Wn. App. 492, 20 P.3d 984 (2001)	17, 18
<u>State v. Gillenwater</u> , 96 Wn. App. 667, 980 P.2d 318 (1999)	8
<u>State v. Greene</u> , 97 Wn. App. 473, 983 P.2d 1190 (1999)	8, 14
<u>State v. Mance</u> , 82 Wn. App. 539, 918 P.2d 527 (1996)	8, 11

<u>State v. Merkt</u> , 124 Wn. App. 607, 102 P.3d 828 (2004).....	9, 12
<u>State v. Mickle</u> , 53 Wn. App. 39, 765 P.2d (1988).....	8
<u>State v. Northness</u> , 20 Wn. App. 551, 582 P.2d 546 (1978).....	9, 12
<u>State v. Rodriguez</u> , 53 Wn App. 571, 769 P.2d 309 (1989).....	12
<u>State v. Thomas</u> , 35 Wn. App. 598, 668 P.2d 1294 (1983).....	18
<u>State v. Walker</u> , 66 Wn. App. 622, 834 P.2d 41 (1992).....	11

United States Supreme Court Decisions

<u>Aguilar v. Texas</u> , 378 U.S. 108, 12 L.ed.2d 723, 84 S.Ct. 1509 (1964).....	9
<u>Spinelli v. United States</u> , 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969)	9

Constitutional Provisions

Const. art. I, § 7.....	8
U.S. Const. amend. IV.....	8

Rules

ER 402	6, 14, 15, 18
ER 403	6, 15, 18

Other Authorities

1 Wayne R. LaFave, <u>Search and Seizure</u> (2d ed. 1987).....	12
---	----

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Olds' motion to suppress the evidence obtained as a result of his unlawful arrest.
2. The trial court abused its discretion in admitting evidence that a gun at issue was a "cop killer".
3. The trial court abused its discretion in admitting evidence regarding the murder of four Lakewood police officers.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A warrantless arrest based on an informant's tip is invalid unless both the informant and the information are reliable or independent police investigation indicates criminal activity along the lines suggested by the informant. Here, a professional informant who was paid \$400 by the police and who also hoped to gain leniency on her own criminal charges told police that Blaine Olds said he had guns for sale, but the informant never saw the guns. Police officers confirmed only innocuous details reported by the informant. Did the police lack probable cause to arrest Mr. Olds, requiring reversal and suppression of the evidence thereby obtained?
2. Under the rules of evidence, irrelevant evidence is inadmissible and relevant evidence should be excluded if it is

substantially more prejudicial than probative. Mr. Olds was charged with unlawful possession of a firearm and possession of a stolen firearm. Neither crime requires proof regarding the type of gun possessed, but the trial court admitted repeated testimony that one of the guns Mr. Olds had was a “cop killer,” and that the informant was concerned because of the recent Lakewood police shootings. Did the trial court abuse its discretion in admitting this inflammatory and irrelevant evidence?

C. STATEMENT OF THE CASE

Appellant Blaine Olds became friends with Rose Evangelista in October of 2009. 7/12/10 RP 100. Mr. Olds spent a lot of time at Ms. Evangelista’s house, where several people regularly congregated and smoked methamphetamines. 7/12/10 RP 101; 7/14/10 RP 6-8. On January 7, 2010, Mr. Olds and his girlfriend, Dawn Swain, went to Ms. Evangelista’s house. 7/12/10 RP 128. After picking up Ms. Evangelista, the three drove to the Fred Meyer store in Burien. 7/12/10 RP 132. Ms. Evangelista got out of the car and walked toward the store. As Mr. Olds and Ms. Swain got out of the car, they were arrested at gunpoint by a team of ten or more police officers. 7/12/10 RP 134.

The car was impounded, and Mr. Olds was taken into custody. 7/13/10 RP 74. During a police interview, he admitted that there were two guns locked in the glove compartment of the car. 7/13/10 RP 79. Police obtained a warrant for the vehicle, and found the guns. 7/13/10 RP 78-79. The State charged Mr. Olds with two counts of being a felon in possession of a firearm and two counts of possessing a stolen firearm. CP 41-42.

Mr. Olds moved to suppress the evidence against him on the basis that the police lacked probable cause to arrest him. CP 7-13. At the hearing on the motion, Detective Sam DeJesus testified that in December of 2009 he received a call from Rose Evangelista, a criminal and professional informant with whom he had worked in the past. Ms. Evangelista told Detective DeJesus that Blaine Olds had left a document on her printer that had information about "cop killer" guns. 7/6/10 RP 18. Ms. Evangelista said the document frightened her, because four police officers in Lakewood had recently been killed. 7/6/10 RP 18-19.

Detective DeJesus asked Ms. Evangelista to obtain more information. 7/6/10 RP 19. He trusted her because she had provided tips in two prior cases, and had given accurate information in each instance. 7/6/10 RP 16-17. In those cases, she had

helped the police in order to “work off” her own criminal charges. 7/6/10 RP 16. For the work she did on Mr. Olds’ case, Detective DeJesus paid her \$400. 7/13/10 RP 103. Ms. Evangelista also had pending charges which she hoped would be reduced or dismissed. 7/13/10 RP 5-8. Although the State indicated that these charges were not part of the contract, Ms. Evangelista’s charges were significantly reduced after Mr. Olds’ case was completed. The State dismissed one felony charge and reduced the other to a misdemeanor. CP 88, 94-106.

While Ms. Evangelista sought more information, Detective DeJesus investigated Blaine Olds and determined that he had a criminal history as well as a current warrant for his arrest. 7/6/10 RP 25. He then asked Ms. Evangelista to ask Mr. Olds “if he was looking to sell guns.” 7/6/10 RP 26. Ms. Evangelista called Detective DeJesus back and indicated that Mr. Olds did want to sell a “5.7” and other guns. 7/6/10 RP 26. Ms. Evangelista then e-mailed Detective DeJesus pictures of guns that Mr. Olds allegedly had for sale. 7/6/10 RP 27. Blaine Olds was not in the pictures. 7/6/10 RP 50. Detective DeJesus never spoke with Mr. Olds directly.

Detective DeJesus and Ms. Evangelista set up a fake sale. Detective DeJesus pretended to be a Mexican buyer from Yakima. 7/6/10 RP 28. The plan was to meet at the Fred Meyer parking lot in Burien on January 7, 2010. 7/6/10 RP 28. The police set up surveillance at both Ms. Evangelista's house and the Fred Meyer. 7/6/10 RP 29. Ms. Evangelista had told Detective DeJesus that Mr. Olds would arrive in a red Honda. The red Honda arrived at Ms. Evangelista's house and Mr. Olds and Ms. Swain got out of the car and went inside the house. 7/6/10 RP 32.

Ms. Evangelista and Detective DeJesus spoke on the telephone while Mr. Olds and Ms. Swain were in the house. 7/6/10 RP 33. Detective DeJesus told Ms. Evangelista to pretend the buyer was anxious because they were late, and to go immediately to the Fred Meyer. 7/6/10 RP 33. The three went to Fred Meyer, where Mr. Olds was arrested. 7/6/10 RP 37-38. Ms. Evangelista had never seen any guns. 7/13/10 RP 136.

The trial court denied the motion to suppress, ruling that Ms. Evangelista was reliable because Detective DeJesus had worked with her in the past, and that the "basis of knowledge" requirement was satisfied by the fact that she had spoken to Mr. Olds directly, even though she never saw him with any guns. 7/7/10 RP 38-39.

The parties and the court then discussed other evidentiary issues. Mr. Olds moved to exclude use of the phrase “cop killer” to describe the gun or guns at issue. CP 28. Mr. Olds pointed out that:

The fact that the guns in question are sometimes referred to as “cop killing” is not relevant to any element of unlawful possession of a firearm. Any reference to “cop killing” only serves to inflame the passions of the jury and does not tend to prove or disprove any element of the crimes charged.

CP 28. Thus, Mr. Olds moved to exclude the evidence as irrelevant and substantially more prejudicial than probative. The court ruled it was relevant “to draw the inference that the CI was correct.” 7/7/10 RP 70. As to ER 403, the court ruled the evidence was admissible because “[Mr. Olds] is the one who brought it up.” 7/7/10 RP 71-72.

Mr. Olds also moved to exclude reference to the murder of four Lakewood police officers, again under ER 402 and 403. CP 28. The court ruled it was admissible because it showed why the informant was concerned. 7/7/10 RP 86.

At trial, police officers testified about the guns in the glove compartment, the fake sale, and Mr. Olds’ confession. 7/12/10 RP 21-82; 7/13/10 RP 35-166. Rose Evangelista testified about her

role in the sting. 7/12/10 RP 99-159; 7/13/10 RP 1-35. A recording of Mr. Olds' interview with police officers was played for the jury.

7/12/10 RP 45.

Multiple witnesses testified about the "cop killing" nature of one of the guns, as well as the concern raised by the Lakewood police shootings. Ex. 2 at 3; Ex. 5; 7/12/10 RP 54, 119, 121; 7/13/10 RP 14, 45-46. The prosecution began its closing argument by stating, "On January 7th of this year, the defendant brought a cop killer, a loaded 5.7 semiautomatic gun and a .44 Anaconda described by the police officers as a massive, powerful handgun."

7/14/10 RP 29.

Mr. Olds' theory at trial was that he did not possess the guns in question. No one ever saw him with the guns, the red Honda was not his car, his girlfriend was driving the car, and the glove compartment was locked. Therefore, Mr. Olds neither actually nor constructively possessed the guns. 7/14/10 RP 40-46. Mr. Olds was acquitted of one count of possession of a stolen firearm, but was convicted of two counts of unlawful possession of a firearm and one count of possession of a stolen firearm. CP 34-37, 79-86.

Mr. Olds appeals. CP 107-24.

D. ARGUMENT

1. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE POLICE LACKED PROBABLE CAUSE TO ARREST MR. OLDS.

a. Police may not arrest a person based on an informant's tip unless the tip satisfies the *Aguilar-Spinelli* standard. A warrantless arrest is valid only if officers have probable cause to believe that a crime is being committed and that the person seized committed the crime. State v. Mance, 82 Wn. App. 539, 541, 918 P.2d 527 (1996); U.S. Const. amend. IV; Const. art. I, § 7. "Probable cause to arrest must be judged on the facts known to the arresting officer before or at the time of arrest." State v. Gillenwater, 96 Wn. App. 667, 670, 980 P.2d 318 (1999). Probable cause to arrest exists only when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been or is being committed. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996); State v. Greene, 97 Wn. App. 473, 478, 983 P.2d 1190 (1999).

Although information provided by an informant may support probable cause, that information must be carefully scrutinized. State v. Mickle, 53 Wn. App. 39, 41, 765 P.2d (1988). In

determining whether an informant's tip is sufficient to establish probable cause, Washington applies the two-pronged Aguilar-Spinelli¹ test. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 36 (1984); State v. Conner, 58 Wn. App. 90, 98, 791 P.2d 261 (1990). Under this standard, the State must establish that (1) the informant is reliable and credible, and (2) the informant has a factual basis for his or her allegations. Jackson, 102 Wn.2d at 443.

The "veracity" prong requires the police to obtain background facts to support a reasonable inference that the informant is credible and without motive to falsify. State v. Bauer, 98 Wn. App. 870, 876, 991 P.2d 668 (2000). In general, a professional informant is considered less reliable than an identified citizen informant, because a professional informant is more likely to be motivated by self-interest. State v. Northness, 20 Wn. App. 551, 557, 582 P.2d 546 (1978).

The "basis of knowledge" prong requires the State to explain the manner in which the informant acquired her information. This prong may be satisfied if the facts alleged are based on the informant's direct personal observations. Id. at 558; State v. Merkt, 124 Wn. App. 607, 613, 102 P.3d 828 (2004). Establishing a

¹ See Spinelli v. United States, 393 U.S. 410, 413, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); Aguilar v. Texas, 378 U.S. 108, 12 L.ed.2d 723, 84 S.Ct. 1509 (1964).

factual basis for the informant's allegations is essential to ensure that the information communicated to police was not based on sheer speculation or provided by an honest informant who simply misconstrued innocent conduct. State v. Sieler, 95 Wn.2d 43, 48-49, 621 P.2d 1272 (1980); see State v. Adame, 39 Wn. App. 574, 577, 694 P.2d 676 (1985) (search warrant invalid where informant reliable but nothing in affidavit establishing the source of the information).

A strong showing on one prong cannot make up for a deficiency on the other:

A claim of first-hand observation should not compensate for the lack of any assurance that the informant is credible. A liar could allege first-hand knowledge in great detail as easily as could a truthful speaker. Conversely, a strong showing of general trustworthiness should not compensate for the failure to explain how the informant came by his information. The qualities that demonstrate truthfulness have nothing to do with demonstrating the basis of knowledge on a particular occasion. Truthful persons can be the bearers of hearsay, rumor, gossip, or bare conclusions, as surely as can be liars.

Jackson, 102 Wn.2d at 441. However, "if an informant's tip fails under either or both prongs, probable cause still may be established by independent police investigation. These investigations should point to suspicious activities or indications of

criminal activity along the lines suggested by the informant.” Id. at 438.

The burden is on the State to show that a warrantless search or seizure is constitutional. Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988). “The rationale for placing the burden on the prosecution is particularly compelling where the issue is the existence of probable cause.” Mance, 82 Wn. App. at 544.

Although a trial court’s findings of fact following a suppression hearing are entitled to deference, “the constitutional rights at issue require an appellate court to make an independent evaluation of the record.” State v. Walker, 66 Wn. App. 622, 625-26, 834 P.2d 41 (1992). This Court reviews a trial court’s conclusions of law de novo. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996).

b. The informant’s tip in this case does not satisfy *Aguilar-Spinelli*, because the informant never saw Mr. Olds with guns and was motivated by both money and hopes of leniency on her own charges. In this case, the State failed to satisfy either prong. As to the veracity prong, although Ms. Evangelista had provided accurate information to the police in the past, her credibility was questionable because she earned \$400 for her accusations against Mr. Olds.

7/13/10 RP 103; see Northness, 20 Wn. App. at 557 (professional informant's report is more "likely to be colored by self interest" than that of an uncompensated citizen informant). Furthermore, Ms. Evangelista had criminal charges pending for which she hoped to earn leniency. 7/13/10 RP 5-8; see State v. Rodriguez, 53 Wn App. 571, 576, 769 P.2d 309 (1989) (citing 1 Wayne R. LaFave, Search and Seizure § 3.4(a), at 726-27 (2d ed. 1987)) (a witness's reliability is greatly diminished when the information is offered in the hope of gaining leniency for other crimes).

Nor was the basis of knowledge prong satisfied. Unlike in Northness and Merkt, the informant here did not directly observe any criminal activity. Although Mr. Olds claimed he had guns for sale, Ms. Evangelista never saw Mr. Olds with the guns she alleged he possessed. 7/7/10 RP 21-22, 35. Indeed, she never saw the guns at all. 7/12/10 RP 136. But "[t]o satisfy the 'basis of knowledge' prong, the informant must declare that [s]he personally has seen the facts asserted and is passing on first-hand information." Jackson, 102 Wn.2d at 437.

Although in some circumstances police investigation can compensate for such deficiencies, that is not the case here. Here, police investigation did not "point to suspicious activities or

indications of criminal activity along the lines suggested by the informant.” Id. at 438. Rather, the police only ascertained Mr. Olds’ criminal history and warrant status. 7/6/10 RP 25, 51. The police never saw Mr. Olds with guns, and never saw any pictures of Mr. Olds with guns. 7/6/10 RP 50. To the extent the police corroborated Ms. Evangelista’s statements, it was only as to innocuous activity, and therefore is not relevant to the analysis. For instance, police verified that Mr. Olds arrived at a designated location in a red Honda, but verification of this benign fact cannot support the probable cause determination. 7/6/10 RP 31-32.

Corroboration of public or innocuous facts only shows that the informer has some familiarity with the suspect’s affairs. Such corroboration only justifies an inference that the informer has some knowledge of the suspect and his activities, not that criminal activity is occurring.

Jackson, 102 Wn.2d at 438.

In sum, the State failed to show that the police officers received reliable information from a credible informant, or that independent police investigation compensated for the deficiencies in the informant’s tip. The police therefore lacked “reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been or is being committed.” Graham, 130

Wn.2d at 724; Greene, 97 Wn. App. at 478. Absent probable cause, the arrest was invalid. Mance, 82 Wn. App. at 541.

c. The remedy is reversal and suppression of the evidence.

All “evidence obtained as a result of an unlawful seizure is inadmissible.” State v. Reichenbach, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). “[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. . . . [W]henver the right is unreasonably violated, the remedy must follow.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Because the guns and the confession in this case were obtained as a result of the unlawful arrest, this Court should reverse and remand with instructions to suppress the evidence.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE THAT ONE GUN WAS A “COP KILLER” AND THAT THE INFORMANT WAS CONCERNED DUE TO THE LAKEWOOD SHOOTINGS.

Over Mr. Olds’ objections, the trial court admitted evidence that one of the guns at issue was a “cop killer,” and that Ms. Evangelista was concerned about Mr. Olds’ activities because of the 2009 murder of four Lakewood police officers. The evidence should have been suppressed under ER 402 because it was irrelevant to the charges in this case. Even if it had been relevant,

it was substantially more prejudicial than probative, and therefore its admission violated ER 403.

a. Irrelevant evidence is inadmissible, and evidence that is substantially more prejudicial than probative should be excluded.

The rules of evidence prohibit the admission of evidence that is not relevant. ER 402. Furthermore, even relevant evidence may be excluded if it is substantially more prejudicial than probative, confuses the issues, or misleads the jury. ER 403. “When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Evidence should be excluded if “its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” Id. at 776.

b. The evidence about “cop killing” guns and the Lakewood shootings should have been excluded because it was irrelevant to the charges and was substantially more prejudicial than probative.

Mr. Olds was charged with two counts of first-degree unlawful possession of a firearm and two counts of possession of a stolen firearm. CP 41-42. As to the former, the State was required to prove that Mr. Olds knowingly had a firearm in his possession or control after having been convicted of a serious offense. CP 68-69. As to the latter, the State was required to prove that Mr. Olds possessed a firearm that he knew was stolen and withheld it from the true owner. CP 72-73. Neither crime requires any showing that the gun is of a particular type. Thus, testimony that one of the guns was a “cop killer” was completely irrelevant to the crimes charged and served only to inflame the passions of the jurors against Mr. Olds. Similarly, the fact that four Lakewood police officers had recently been murdered was completely irrelevant to the elements the State was required to prove, and was simply inflammatory.

Indeed, trial counsel explained both of these points during pretrial hearings, stating, “I think that probative value is limited given the portion that might inflame the jury when it’s not the element of a crime. He is not charged with possessing a cop killing gun. He is charged with possessing a gun.” 7/7/10 RP 70-71. The court responded, “He is. The question is ... what’s the motivation of the CI in this case for going to the police?” 7/7/10 RP 71. But

the State was not required to prove the informant's motive for calling the police. The State was required to prove that Mr. Olds possessed guns. Neither the type of gun nor the fact that four police officers had been shot by someone else had any relevance to the charges here. The evidence was highly prejudicial, and should have been excluded.

This Court's decision in Freeburg is instructive. State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001). That case involved a defendant who shot and killed another man, and was finally tracked down and arrested a little over two years later. Freeburg, 105 Wn. App. at 495-96. The trial court admitted evidence that the defendant was carrying a gun when he was apprehended, on the basis that the evidence was relevant to show flight and consciousness of guilt. Id. at 496-98. This Court reversed, holding the evidence was not relevant for that purpose, in part because the gun used in the shooting was not the same as the gun found on the defendant. Id. at 500. Furthermore, the prejudicial effect of the evidence outweighed its probative value. Id. at 501. "Evidence of weapons is highly prejudicial, and courts have uniformly condemned evidence of dangerous weapons, even though found in the possession of a defendant, which have nothing

to do with the crime charged.” Freeburg, 105 Wn. App. at 501 (citations omitted).

If the evidence was highly prejudicial in Freeburg, it was even more so here. This community was still reeling from the Lakewood murders and other police shootings at the time of Mr. Olds’ trial. Mr. Olds was supposed to be on trial for possessing guns, not for shooting police officers or for planning to shoot police officers. Yet the trial court admitted repeated testimony about “cop killers” and the Lakewood shootings. This ruling violated ER 402 and ER 403.

c. The remedy is reversal and remand for a new trial.

Evidentiary errors require reversal if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). Evidence of weapons is “highly prejudicial,” Freeburg, 105 Wn. App. at 501, and jurors likely regarded Mr. Olds with great disdain after repeatedly hearing that he was researching “cop killing” guns and that others were concerned due to the Lakewood killings. Ex. 2 at 3; Ex. 5; 7/12/10 RP 54, 119, 121; 7/13/10 RP 14, 45-46. Not only did multiple witnesses testify that one of the guns was a “cop killer,” but the

State began its closing argument by stating, “On January 7th of this year, the defendant brought a cop killer, a loaded 5.7 semiautomatic gun and a .44 Anaconda described by the police officers as a massive, powerful handgun.” 7/14/10 RP 29.

Absent the irrelevant and inflammatory evidence, it is reasonably probable Mr. Olds would have been acquitted. As he argued in the trial court, the evidence of possession was weak given that nobody saw him with guns, the car in which he was riding was not his, and the guns were found in a locked glove compartment for which Mr. Olds did not have the keys. Thus, as in Freeburg, “[g]iven the powerful nature of the evidence, its lack of relevance, and the absence of a limiting instruction, [this Court] cannot characterize its admission as harmless.” Id. Mr. Olds’ conviction should be reversed and his case remanded for a new trial at which evidence of the Lakewood shootings and “cop killing” guns will be excluded.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Olds' conviction and remand for suppression of the guns and confession and/or for a new trial.

DATED this 23rd day of March, 2011.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65922-7-I
v.)	
)	
BLAINE OLDS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> BLAINE OLDS 993782 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584-0974	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF MARCH, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710